Supreme Court, U.S.
FILED

041661 JUN 7 2005

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

SHEUE-JAN TSAY,

Petitioner,

vs.

DEPARTMENT OF THE NAVY,

Respondent.

On Petition For A Writ Of Certiorari To United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

SHEUE-JAN TSAY (Pro Se Litigant)
556 N. Dartmouth Way
Anaheim, CA 92801
714-772-5038

QUESTION PRESENTED

Did Petitioner receive due process of law when she was removed from her federal civil service position with the Department of the Navy?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 7

INDEX TO APPENDICES

APPENDIX A – ORDER OF U.S. COURT OF APPEALS DENYING REHEARING A-1

APPENDIX B – DECISION OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT B-1

APPENDIX C – DECISION OF THE U.S. MERIT SYSTEMS PROTECTION BOARD C-1

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 5

Grannis v. Ordean, 234 U.S. 385 (1914) 5

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 5, 6

Lee v. Kemna, 534 U.S. 362 (2002) 5

Mathews v. Eldridge, 424 U.S. 319 (1976) 5

STATUTE

28 U.S.C. §1254(1) 2

CONSTITUTION

U.S. Const. amend. V 3

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the Unites States court of appeals appears at Appendix B to the petition and has been designated for publication but is not yet reported.

JURISDICTION

For cases from **federal court**:

The date on which the United States Court of Appeals decided my case was January 14, 2005.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 11, 2005, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of life, liberty, or property, without due process of law***; nor shall private property be taken for public use, without just compensation. (emphasis added) – Amendment V to the United States Constitution

STATEMENT OF THE CASE

The Petitioner was removed August 30, 2002, from her civil service position as an electronics engineer with the Naval Air Warfare Center Weapons Division, China Lake, California. A timely petition for review was filed with the United States Merit Systems Protection Board. Petitioner filed a brief dated February 14, 2003, with the Board one day late (it was received by the Board the morning of the first work-day following the due date). The brief was rejected on timeliness grounds. Subsequently, the Board sustained the agency's removal action.

A timely appeal of the decision of the Merit Systems Protection Board was filed with the Court of Appeals for The Federal Circuit. That Court affirmed the decision of the Board. A timely request for rehearing was filed with the Court of Appeals, but was denied.

REASONS FOR GRANTING THE PETITION

A fundament precept of our constitutional systems is that no person may "*be deprived of life, liberty, or property, without due process of law.*" Any cracks in due process jurisprudence raise issues at the very heart of our liberties. In the modern age, no interest is more central to our very existence than our property interest in our employment. This Court has held in *Grannis v. Ordean*, 234 U.S. 385, 394 that "[t]he fundamental requiste (sic) of due process of law is the opportunity to be heard." In *Armstrong v. Manzo*, 380 U.S. 545, 552 the Court held, "[t]he fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." That fundamental right has been denied Petitioner.

In the present case, Petitioner's brief to the Merit Systems Protection Board was received the morning of the work-day following the day it was due. Petitioner was indeed late; however, neither the Agency nor the Board has ever articulated any harm from, receiving Petitioner's brief what is effectively a few hours late. This Court has held in *Mathews v. Eldridge*, 424 U.S. 319, 333, "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)." Further, addressing a similar issue in a criminal matter in *Lee v. Kemna*, 534 U.S. 362, 366-367, this Court held, "His [Petitioner Lee] asserted right to defend *should not depend on a formal 'ritual . . .* [that] would further no perceivable state interest.' *Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (quoting *James v. Kentucky*, 466 U.S. 341, 349 (1984) (in

turn, quoting *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958))) (internal quotation marks omitted). (emphasis added). Finally, this Court has made it clear that due process is not a mindless ritual, "[b]ut 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing, as it does in its ultimate analysis, respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula." *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*.

Petitioner has lost her electronics engineer job of 14 years, a grievous loss indeed. Neither the Agency nor the Board has articulated any governmental interest in summary adjudication in this matter. Petitioner's brief was never considered and she was removed for no reasons other than reliance on mindless "formal ritual."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHEUE-JAN TSAY

Date: June 7, 2005

APPENDIX A

ORDER OF U.S. COURT OF APPEALS DENYING REHEARING

Case No. TSAY v. NAVY, 04-3363

(ORDER Dated: March 11, 2005)
(Entered Date: JAN 14, 2005)
(ISSUED AS A MANDATE: MAR 18, 2005)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-3363

SHEUE-JAN TSAY,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

ORDER

(Filed Mar. 11, 2005)

Before MICHEL, Chief Judge, NEWMAN, Circuit Judge, and PROST, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on March 18, 2005.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: March 11, 2005

cc: Sheue-Jan Tsay
Brian S. Smith

TSAY V NAVY, 04-3363
(MSPB – SF0752020700-I-1)

* *

* Note: Pursuant to Fed. Cir. R. 47.6, this order *
* is not citable as precedent. It is a public record. *

* *

United States Court of Appeals
for the Federal Circuit

04-3363

SHEUE-JAN TSAY,

Petitioner

v.

DEPARTMENT OF THE NAVY,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

In CASE NO(S). SF0752020700-I-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER
OF THE COURT,

DATED: Jan 14, 2005 /s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE:
Mar. 18, 2005

APPENDIX B

DECISION OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Case No. TSAY v. NAVY, 04-3363

(DECIDED: January 14, 2005)
(NOTICE OF ENTRY: 01/14/05)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 01/14/05

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and petitions for rehearing en bane. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Petitioner(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.

/s/ JAN HORBALY
JAN HORBALY
Clerk

cc: SHEUE-JAN TSAY
BRIAN S. SMITH

TSAY V NAVY, 04-3363
MSPB-SF0752020700-I-1

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

04-3363

SHEUE-JAN TSAY,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

DECIDED: January 14, 2005

Before MICHEL, *Chief Judge*, NEWMAN and PROST, *Circuit Judges*.

PER CURIAM.

Ms. Sheue-Jan Tsay appeals the decision of the Merit Systems Protection Board, Docket No. SF0752020700-I-1, holding that Ms. Tsay was lawfully removed as unable to perform the essential duties of her job, We *affirm*.

BACKGROUND

Ms. Tsay was employed as an Electrical Engineer at the Naval Air Warfare Center Weapons Division in China Lake, California, having been a federal employee for 14 years. In 2002, Ms. Tsay asked her psychologist, Dr. Seymour, to submit a report to the Human Resource

Department personnel concerning his treatment of her over the preceding four years. Dr. Seymour reported that Ms. Tsay suffered from "increasing anger and anxiety," an "inability to concentrate," and that she has become "increasingly depressed, angry, and anxiety ridden" and had a perception "that she was being monitored every minute." Letter of May 9, 2002 (hereinafter "Psychological Progress Review"). Her symptoms include "extreme anger and frustration, frequent crying episodes, inability to concentrate, obsessional thinking, gastro-intestinal problems, insomnia, feelings of persecution, and increasing social isolation." Dr. Seymour continued, "As the treating psychotherapist, I have recommended that she consider alternative employment as she appears headed for a serious mental breakdown."

With Ms. Tsay's consent, Dr. Seymour then met with agency personnel. Dr. Seymour stated that "she needed a low stress position," a "flexible schedule (morning hours)," "a workplace free from distraction," and "a new supervisor [with] a higher education level than Ms. Tsay." When asked, Dr. Seymour agreed that Ms. Tsay would be better able to concentrate if she had "no performance standards, no deadlines, and no accountability." Report of Meeting of June 6, 2002. The agency determined that accommodation was not possible, and issued a Notice of Decision to Remove Ms. Tsay in August of that year. The Board affirmed the agency decision that Ms. Tsay was unable to perform her job. The Board rejected Ms. Tsay's defenses of handicap discrimination, discrimination based on reprisal, and discrimination based on sex, national origin, race, and age. This appeal followed. In taking this appeal to the Federal Circuit, Ms. Tsay waived or abandoned the defenses based

on discrimination, and argues solely that there was insufficient evidence to support the Board's decision.

DISCUSSION

> This court reviews agency action to determine whether the action was:
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence.

5 U.S.C. §7703(c); *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

I

An agency may act adversely against an employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). The agency must support the reason for the removal with preponderant evidence, and show a nexus between the reason and the efficiency of the service.

There was substantial evidence that Ms. Tsay had a mental condition that rendered her unable to meet the requirements of her position. At Ms. Tsay's request, her treating psychologist disclosed to the Navy that she possessed a mental condition of anger, anxiety, depression, and paranoia, which had increased in intensity over the four preceding years, and that she had an inability to concentrate. Her treating psychologist also stated that Ms. Tsay needed more flexible work hours, no deadlines or

pressure, and that she would do better with a different supervisor.

There was substantial evidence for the agency's finding that Ms. Tsay's condition adversely affected her performance of the requirements of her position, and that the agency was unable to provide the requested accommodations. On this basis, the agency's action must be affirmed.

II

Ms. Tsay also argues that the Board deprived her of due process of law when it refused to accept a brief which was mailed on the deadline for receipt and which consequently was received late. Due process is not violated by enforcing deadlines, *see James v. Office of Personnel Management*, 372 F.3d 1365, 1369 (Fed. Cir. 2004) ("requirements of strict adherence to filing and timing rules are ubiquitous in our legal system"); we also take note that the agency states that her psychologist's reports were before the Board and that she did not request an oral hearing. We discern no violation of due process in the Board's procedure.

APPENDIX C

DECISION OF THE U.S. MERIT SYSTEMS PROTECTION BOARD
DOCKET No. SF-0752-02-0700-I-1

(**FINAL ORDER** Dated: May 14, 2004)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SHEUE-JAN TSAY,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
SF-0752-02-0700-I-1

DATE: MAY 14 2004

Gerald R. Stein, Esquire, Las Vegas, Nevada,
for the appellant.

Andre Long, Esquire, China Lake, California,
for the agency.

BEFORE

Neil A. G. McPhie, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R.

§ 1201.115(d). Therefore, we DENY the petition for review. In light of our decision, we do not address the timeliness of the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: /s/ Matthew Shannon
Bentley M. Roberts, Jr.
for Clerk of the Board

Washington, D.C.